Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

FLORET, L.L.C. and MICHELE LEA EGGERT,

Petitioners,

v.

THOMAS J. SENDECKY, GREGORY M. HEWITT, HEWITT FINANCIALSERVICES, FREDRIKSON & BYRON, P.A., and RICK PETRY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

1. Whether a district court's order is void if, on appeal from bankruptcy court, said district court deprives a party of a right clearly provided by a federal rule of bankruptcy procedure.

2. Whether the Eighth Circuit abused its discretion (i) when it affirmed the bankruptcy court's dismissals of five of six defendants without leave to amend, (ii) when it summarily affirmed the district court's summary affirmance of the bankruptcy court's imposition of Rule 9011 sanctions on petitioners' attorney, and (iii) when it summarily granted the motion of respondents Fredrikson & Byron and Rick Petry for Rule 38 sanctions.

PARTIES TO THE PROCEEDING

Petitioners Floret, LLC, a Minnesota limited liability company, is a judgment creditor of the debtor, Thomas M. Sendecky, said judgment for $16,253.19 having been entered on June 1, 2001, in favor of Floret, LLC, and Michele Eggert, jointly and severally, following the trial to a jury of the case of *Floret, L.L.C, and Michele Eggert v. Hewitt Financial Network, a sole proprietorship, and Gregory M. Hewitt, jointly and severally, and Thomas M. Sendecky*, Hennepin County District Court No. AC 99-015802 (Oliesky, J.) [hereinafter "The Hewitt-Sendecky Case"]. Petitioner Michele Lea Eggert, the sole member of petitioner Floret L.L.C, was a very close friend of the debtor from 1986 to 1999 and works six sixteen hour days a week managing her wedding and retail floral and home accessories business.

Respondent Thomas J. Sendecky is a Minnesota resident and the father of debtor Thomas M. Sendecky.

Respondent Gregory M. Hewitt is a Minnesota resident and was a defendant in The Hewitt-Sendecky Case. Respondent Hewitt Financial Network or Hewitt Financial Services is a sole proprietorship of Gregory M. Hewitt and was also a defendant in The Hewitt-Sendecky Case. Together they settled out of the Hewitt-Sendecky Case by paying $12,500 to petitioners on the eve of trial.

Respondent Fredrikson & Byron, P.A., is a law firm with offices in Minneapolis and London and affiliates in Mexico City, Warsaw, Montreal, Toronto, and Vancouver. Respondent Rick Petry is Minnesota resident and, at all relevant times, an attorney employed by respondent Fredrikson & Byron, P.A. He represented debtor Thomas M. Sendecky and respondents Gregory M. Hewitt and Hewitt Financial Network in The Hewitt-Sendecky Case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The district court's order (per Frank, J.) on appeal from bankruptcy court affirmed the bankruptcy court's decision in all respects (Appendix ("Pet. App.") 8a-14a) and is not otherwise published. The court of appeals' opinion (per Wollman, Heaney, and Melloy, JJ.) affirmed the district court;'s order in all respects (Pet. App. 4a-7a) and is published at 315 F.3d 904. The court of appeals' orders denying rehearing *en banc* (*id.* 2a) and stay of mandate (*id.* 1a) are not otherwise published.

STATEMENT OF JURISDICTION

On January 6, 2003, the court of appeals entered its opinion affirming the district court's order which had upheld the bankruptcy court's order which dismissed five of six defendants without leave to amend and imposed sanctions on petitioners' attorney in the amount of $3,535. On February 14, 2003, the court of appeals summarily denied petitioners' petition for rehearing *en banc*, and, on February 26, 2003, the court of appeals summarily denied petitioners' motion to stay mandate. Petitioners invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provision of the Federal Rules of Bankruptcy Procedure that is relevant to this petition is Fed. R. Bankr. P. 8009(3), which provides:

> The appellant may serve and file a reply brief within 10 days after service of the brief of the appellee, and if the appellee has cross-appealed, the appellee may serve a reply brief to the response of the appellant to the issues presented in the cross appeal within 10 days after service of the reply brief of the

appellant. No further briefs may be filed except with leave of the district court or the bankruptcy appellate panel.

STATEMENT OF THE CASE

The underlying adversary proceeding involved the attempt by two-joint-and several judgment creditors, Floret, L.L.C., and Michele Eggert (collectively "petitioners"), to obtain a denial of the discharge of debtor Thomas M. Sendecky ("debtor Sendecky"). In addition to debtor Sendecky, Floret's Complaint named five other defendants: Respondent Thomas J. Sendecky, Gregory Hewitt, individually and d/b/a Hewitt Financial Network (collectively "Hewitt respondents"), the law firm of Fredrikson & Byron, P.A., and one of its attorneys, Rick Petry (collectively "Fredrikson & Byron respondents").

Petitioners commenced the adversary proceeding on September 27, 2001, with the filing of a Complaint and Jury Demand. Pet. App. 15a-22a. Respondent Thomas J. Sendecky's two-page, handwritten letter to the bankruptcy judge was treated as an answer by the bankruptcy court. Debtor Sendecky and the Hewitt respondents filed sham answers, while the Fredrikson & Byron respondents filed a Rule 12(b)(6) motion to dismiss in *lieu* of answering. Each of the others then filed motions to dismiss as well, and all of the respondents as well as debtor Sendecky filed motions for Rule 9011 sanctions. Petitioner filed responses in opposition to each of those motions.

On November 29, 2001, a hearing of all of those motions was held in the bankruptcy court (Dreher, J.). From the bench, petitioners' Complaint was dismissed as to respondent Thomas J. Sendecky and the Hewitt and Fredrikson & Byron respondents without leave to amend, and, pursuant to Fed. R. Bankr. P. 9011(2),[1]

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1 "(b)By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable

the bankruptcy court granted the Hewitt and Fredrikson & Byron respondents' Rule 9011 motions for costs and attorney's fees and invited the submission of affidavits of such costs and fees.[2] On December 7, 2001, the Hewitt[3] and Fredrikson & Byron respondents filed affidavits of fees and costs seeking $985 and $5,426, respectively, and petitioner filed an objection to those affidavits five days later. On December 21, 2001, petitioners filed a timely notice of appeal to the district court. On January 10, 2002, the bankruptcy court ordered entry of judgment of $985 and $2,550 against petitioners' attorney and in favor of the Hewitt and Fredrikson & Byron respondents, respectively, whereupon petitioners' appeal to the district court was amended to include review of those sanctions.

Petitioners' appeal was docketed in the district court on January 15, 2002, and the timely filing of petitioners' brief was followed by the timely filing of an answering brief by the Fredrikson & Byron respondents and the filing of a timely but abysmally deficient "memorandum in opposition" by the Hewitt respondents.[4] However, on February 28, 2002, and

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under the circumstances, . . . (2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;"

2 The motions for sanctions brought by debtor Sendecky and respondent Thomas J. Sendecky were denied as procedurally deficient, and debtor Sendecky's motion to dismiss was granted but with leave to amend. Plaintiffs filed a First Amended Complaint on December 20, 2001, and debtor Sendecky's motion to dismiss that amended Complaint was heard on January 7, 2002, and denied from the bench and in an Order filed on January 10, 2002. Accordingly, the appeal of the dismissal of debtor Sendecky was withdrawn by Floret.

3 The Hewitt respondents' attorney has withdrawn in the meantime due to an unexplained conflict of interest.

before petitioners' time to file a reply brief had run, the district court filed an order which upheld the decision of the bankruptcy court in all respects. Petitioners immediately appealed from that order to the Eighth Circuit.

The Fredrikson & Byron respondents' answering brief to the Eighth Circuit was accompanied by a motion for appellate sanctions pursuant to Fed. R. App. P. 38.[5] In an order dated December 3, 2002, the Eighth Circuit cancelled the scheduled oral argument and declared that the appeal would be decided on the briefs and record. On January 6, 2003, the Eighth Circuit filed a published opinion affirming the district court's order in all respects and holding in pertinent part as follows as to the district court's issuance of its decision before petitioners' time to file a reply brief had run:

> We find no error in the district court's decision to issue its opinion before Floret filed its reply brief. Floret has failed to demonstrate that it had any additional arguments that had not already been advanced in its opening brief, nor does Floret cite any case law that suggests that the

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[4] The Hewitt respondents did not make a good faith effort to comply with Fed. R. Bankr. P. 8009 and 8010, and their attorney does not appear to have even read them. The Hewitt respondents did not file a brief, addendum, or appendix. They instead filed a motion memorandum with an attached exhibit, did not denominate it as a brief, and do not appear to have filed two copies along with the original of their non-Brief as required. It had no table of contents, nothing called an addendum or appendix, no table of authorities, no appropriate headings, and no observance of the required order. The district court did not care and probably did not even notice.

[5] "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee."

district court's actions constitute reversible error. *See City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9th Cir. 2001)

Pet. App. 6a-7a.

In reaction to that and pursuant to 28 U.S.C. § 1927 and the inherent power of the Eighth Circuit, petitioners filed a motion for appellate sanctions on the grounds that the Fredrikson & Byron respondents' attorneys had deceived the Eighth Circuit into holding that the district court's action did not constitute reversible error.[6] On February 6, 2003, and after having denied petitioners' petition for rehearing *en banc*,[7] the Eighth Circuit summarily granted the Fredrikson & Byron respondents' motion for appellate sanctions in the amount requested ($3,955) but has never ruled on petitioners' motion for appellate sanctions. Petitioners' motion to stay mandate was summarily denied on February 26, 2003, and this petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. Certiorari Is Warranted Because The Eighth Circuit's Published Finding Of No Error In The District Court's Denial Of Due Process Conflicts With Decisions Of This Court And Of Courts Of Appeals Holding That A Federal Court Has No Discretion To Disregard The Mandate Of A Federal Rule.

The Fredrikson & Byron respondents personally served their response brief to the district court on February 19, 2002, the day after a federal holiday (Presidents' Day). The deadline for the filing of petitioners' reply brief thus was March 1, 2002, *i.e.*,

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6 The Eighth Circuit's failure to rule on petitioners' motion for appellate sanctions is the subject of a contemporaneously filed petition for a writ of mandamus titled *In re: Floret, L.L.C., and Michele Lea Eggert, Petitioners.*

7 *Inter alia*, petitioners motion to stay mandate reminded the Eighth Circuit that their motion for appellate sanctions was pending before the court.

pursuant to the district court's Briefing Schedule for Bankruptcy Appeals and Fed. R. Bankr. P. 8009(3), ten days after February 19th The district court, however, filed its order affirming the bankruptcy court's decision in all respects on February 28, 2002.

A right to file a reply brief was mandated in the district court's Briefing Schedule for Bankruptcy Appeals ("Appellant may submit an original and two copies of a reply brief within 10 days after service of appellee's brief.") (emphasis in original) and is mandated in Fed. R. Bankr. P. 8009(3) ("The appellant may serve and file a reply brief within 10 days after service of the brief of the appellee, ..."). In direct conflict with the rules, the district court issued its decision before petitioners' time to file a reply brief had run. The Eighth Circuit nonetheless held that "We find no error in the district court's decision to issue its opinion before Floret filed its reply brief" and then cited *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9th Cir. 2002), in support of the statement that "Floret has failed to demonstrate that it had additional arguments that had not already been advanced in the opening brief, nor does Floret cite any case law that suggests that the district court's actions constitute reversible error."

In *Baykeeper*, the Ninth Circuit rejected a party's argument that due process is violated when a court or administrative agency *does not provide* a mandatory right to file a reply brief. *Id.* (emphasis added). *Baykeeper* thus is unmistakably inapposite because petitioners never argued nor had any reason to argue that a right to file a reply brief "should have" existed. As shown *supra*, such a right *existed*, just as such a right is provided in Fed. R. App. P. 28(c) and in every briefing schedule the Eighth Circuit sends to parties after a notice of appeal is filed.

The district court's impermissible disregard for the rules cannot be blithely excused by simply holding that petitioners would not have had anything else to say anyway. That conclusory absolution of the district

court's clear error by the Eighth Circuit conflicts with numerous Supreme Court holdings. In *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988), *e.g.*, wherein this Court ruled that a federal court may not invoke its inherent power to circumvent the harmless-error inquiry *prescribed* by Fed. R. Crim. P. 52, this Court held in pertinent part:

> It follows that Rule 52 is, in every pertinent respect, *as binding as any statute enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions.* (Emphasis added.)

The Seventh Circuit declined to countenance the district court's remarkably similar misconduct in *Kovilic Construction Co., Inc. v. Missbrenner*, 106 F.3d 768 (7th Cir. 1997). On appeal from the bankruptcy court, the district court had reversed the bankruptcy court's decision on the merits and ordered entry of judgment of $49,476.17 in the creditor's favor because the debtor's attorney had never filed an appearance form (for which he could have been penalized $50 if it were filed late) nor an affidavit of ethical conduct (for which he could have been barred from participating in the proceedings pending compliance). On further appeal, the 7th Circuit reversed and in pertinent part held:

> The 'supersession' clause of the Rules Enabling Act, 28 U.S.C. sec. 2072(b), which states that laws in conflict with national rules of procedure shall be of no further force or effect, *suggests that exercises of inherent powers may also not directly conflict with the national procedural rules. See also* Fed. R. Civ.P. 83(b). This court has recognized the need to be cautious when resorting to inherent powers to justify an action, particularly when the matter is governed by other procedural rules, lest (even in the absence of a direct conflict) the restrictions in those rules become

> meaningless. *See, e.g., G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648, 652 (7th Cir. 1989) (en banc) (*noting that although the district court has 'substantial inherent power,' this power must be exercised in harmony with the Federal Rules of Civil Procedure); Strandell v. Jackson County, Ill.*, 838 F.2d 884, 886-87 (7th Cir. 1987) (same).

Id. at 772-73 (emphasis added).

Under the Eighth Circuit's unsupported and unsupportable reasoning, it would have been permissible, *e.g.*, for the district court to have reversed the bankruptcy court's decision before the *appellees'* time to file response briefs had run or even before petitioners' time to file an initial brief had run. And it would have been permissible under the Eighth Circuit's reasoning, *e.g.*, for the Eighth Circuit itself to have issued a decision on petitioners' appeal to that court before briefing was completed or even begun. Under the Eighth Circuit's reasoning, moreover, the appellate process could reasonably consist of only the filing of a notice of appeal and the issuance of a decision based on a whim as to what *would or would not be* argued, and the Eighth Circuit's briefing schedule could then include a statement like "Here's the briefing schedule but don't be surprised or feel aggrieved if the court decides the matter before some or any of the briefs are filed."

What is actually said at the beginning of the Eighth Circuit's briefing schedule, of course, is this: "Because this court has directed that the practice of routinely granting extensions of time be discontinued, counsel and *court personnel* must carefully note the dates indicated and arrange their schedues to insure compliance with this order." (Emphasis added.)

The district court, sitting as an appellate court in this case, had all of the responsibilities that the Eighth Circuit or any other federal appellate court has. The district court's issuance of a decision before petitioners' time to file a reply brief had run was not a mere

procedural misstep; it was a clear and inherently prejudicial error of law which rendered its decision void and undeserving of review by the Eighth Circuit. As it stands now, however, the Eighth Circuit's *published* opinion tells the district courts that doing what the district court did in this case is okay ("We find no error in the district court's decision to issue its opinion before Floret filed its reply brief."). This case accordingly merits this Court's immediate review.

II. Certiorari Is Warranted Because The Eighth Circuit's Opinion Conflicts With Its Self-Imposed Obligation To Review A Bankruptcy Court's Findings Of Fact For Clear Error And Conclusions Of Law *De Novo* And Because It Conflicts With The Well-Settled Practice Of Permitting At Least One Amendment Of A Complaint Before Dismissing It.

On an an appeal from a bankruptcy appellate panel or a district court charged with reviewing a bankruptcy court's decision, the Eighth Circuit is to review the bankruptcy court's findings of fact for clear error and conclusions of law *de novo*. *Papio Keno Club, Inc. v. City of Papillion*, 262 F.3d 725, 728-29 (8th Cir. 2001), *citing, Blackwell v. Lurie (in re Popkin & Stern)*, 223 F.3d 764, 765 (8th Cir. 2000). The review is to be a *searching and independent one. Id.* at 729 (emphasis added).

The Eighth Circuit's opinion reveals that the Eighth Circuit did not conduct anything which even remotely resembled a searching and independent review of the bankruptcy court's factual findings and conclusions of law. *See generally* Pet. App. 4a-7a. The Eighth Circuit's opinion reveals that the Eighth Circuit reviewed nothing more than the decision of the district court, a decision which, just as obviously, was not the product of a searching review of the bankruptcy court's factual findings and conclusions of law. *See generally* Pet. App. 4A-7A. Specifically, the district court did not set out the standard pursuant to which it was to review

the factual findings of the bankruptcy court (*see generally* Pet. App. 8a-14a), nor provide any indication that the bankruptcy court's factual findings were reviewed. And although the district court did set out the standards pursuant to which it was to review the "legal determinations" of the bankruptcy court (*'de novo'*) and the bankruptcy court's decision "to impose attorney's fees and costs" ("abuse-of-discretion"), the district court conducted no such reviews. The district court's decision contains no discussion of the bankruptcy court's conclusions of law, and, as to the sanctions imposed by the bankruptcy court, it contains only a bald finding of no abuse of discretion. The district court's order was not even based on a correct understanding of the statute pursuant to which petitioners had objected to the debtor's discharge. The district court believed that petitioners were "apparently" seeking to revoke the discharge pursuant to "11 U.S.C. § 727(c)" (Pet. App. 10a and 12a), whereas petitioners objected under *11 U.S.C. § 727(a)(2)-(5) and not under 11 U.S.C. § 727(c).*

Evidence that the Eighth Circuit reviewed the district court's decision instead of the record emerges in the Eighth Circuit's identical misstatement that petitioners sought to prevent entry of the discharge pursuant to "11 U.S.C. § 727(c)." Pet. App. 5a. Moreover, the Eighth Circuit's opinion does not include any indication that the bankruptcy court's factual findings were reviewed. The Eighth Circuit's opinion contains no discussion of the bankruptcy court's findings of fact and conclusions of law, and, as to the sanctions imposed by the bankruptcy court, it contains only a bald affirmance of *the district court's* bald finding of no abuse of discretion.

In a re-packaged echo of the district court's irrelevant straw man discussion of equitable subordination, the Eighth Circuit states that "Floret also alleged that the bankruptcy court should have applied the theory of equitable subordination to its case, despite Floret's failure to mention equitable subordination in

any of its briefs" and that "its claim against the other creditors should be considered a *claim for*[8] equitable subordination" (citing *In re Danbury Assoc.*, 153 B.R. 657, 661 (Bankr. S.D.N.Y. 1993)) (emphasis added). Pet. App. 6a. The problem with all of that is this: Petitioners did *not* claim for equitable subordination, petitioners did *not* allege that the bankruptcy court "should have" applied the theory of equitable subordination to the case, and equitable subordination *was* discussed at length in petitioners' brief to the district court. The Eighth Circuit would have noticed that if a proper review of the pleadings had preceded its bald conclusion that "It is clear from the complaint and answers that no valid cause of action was stated against appellees." Pet. App. 6a. Petitioners argued on appeal to the district court that, *conceivably*, the bankruptcy court *could* have applied the doctrine of equitable subordination to the case after properly reviewing the Complaint to ascertain whether some relief might be granted under *any* theory.[9] Moreover, *Danbury* does not support the Eighth

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8 Equitable subordination is a remedial doctrine, as are, *e.g.*, *respondeat superior*, unclean hands, collateral estoppel, specific performance, *stare decisis*, *res judicata*, and, of course, Gaylord Perry's doct'rine of a baseball. Equitable subordination, of course, is neither a claim nor a cause of action. *See, e.g.*, the seminal *Pepper v. Litton*, 308 U.S. 295, 305 (1939), wherein this Court said in pertinent part: "For certainly if, as provided in [§ 57(k)], a claim which has been allowed may be later 'rejected in whole or in part, according to the equities of the case', disallowance or subordination in light of equitable considerations may originally be made."

9 *See Bramlet v. Wilson*, 495 F.2d 714, 716 (8th Cir. 1974), *citing*, 5 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1216 at pp. 120-21 (1969) ("[A] complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, *for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory.*") (emphasis added).

Circuit's gratuitous straw man holding that a (non-existent) "claim for" equitable subordination fails because the case is a "no assets" case. The instant case was labeled a "no assets" case by a disinterested trustee after he asked the debtor a few rudimentary questions at the first creditors meeting and before the debtor's schedules had been put to any kind of a meaningful challenge. In *Danbury*, there was a chance that the case *could* (*i.e.*, might) end up being a no assets case, but the bankruptcy court nevertheless held that the trustee *should file* an adversary proceeding with respect to equitable subordination and did *not* sanction the trustee for basing his opposition to Aetna's motion for summary judgment solely on a contention that Aetna's claim should be equitably subordinated. *Id.* at 661-662 (emphasis added). The bankruptcy court in *Danbury* observed that "t]he court has never questioned that the trustee may bring an action under 11 U.S.C. 510(c) in this court, only the utility of initiating such an action [if there is going to be no bankruptcy distribution]." *Id.* at 661.

Whether the bankruptcy court in the instant case abused its discretion when it dismissed without leave to amend was the gravamen of petitioners' appeal to the district court, and that was ignored by both the district court and the Eighth Circuit. The failure of the district court and the Eighth Circuit to review or even mention that issue conflicts with the well-settled standard of reviewing judgments on the pleadings and denials of leave to amend in the Eighth and other circuits as well as this Court.

Generally, a dismissal under Rule 12(b)(6) is not final or on the merits, and the court normally will give the plaintiff leave to file an amended complaint. *Udom v. Fonseca*, 846 F.2d 1236, 1238 (9th Cir. 1988). The test most often applied to determine the sufficiency of a complaint was set out in the leading case of *Conley v. Gibson*, 355 U.S. 41 (1957), in which this Court stated: "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint

should not be dismissed for failure to state a claim unless it appears *beyond doubt* that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-46 (Black, J.) (emphasis added). A motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted. *Hall v. City of Santa Barbara*, 813 F.2d 198, 201 (9th Cir. 1986). The burden is on the movant to prove that no claim exists. *Clapp v. LeBocuf, Lamb, Leiby & McRae*, 862 F.Supp. 1050 (D.C. N.Y. 1994). It need not appear that the plaintiff can obtain the particular relief prayed for, as long as the court can ascertain that some relief may be granted. *Neitzie v. Williams*, 498 U.S. 319, 325 (1989). "If it is conceivable that, under the *allegations* of his complaint, a plaintiff can, upon a trial, establish a case which would entitle him to the relief prayed for, a motion to dismiss for insufficiency ought not to be granted." *Id.* at 582 (emphasis added); *see Bramlet*, 495 F.2d at 716 ("All that is required by Federal Rules of Civil Procedure 8(a) is 'a short and plain statement of the claim showing that the pleader is entitled to relief.'"). "[A] complaint should not be dismissed merely because the court does not believe the plaintiff will prevail in the action." *Bramlet*, 495 F.2d at 717, *citing, Thomason v. Hospital T. V. Rentals*, 272 F.2d 263, 266 (8th Cir. 1959).

The federal policy of deciding cases on the basis of the substantive rights involved rather than on technicalities requires that the plaintiff be given every opportunity to cure a formal defect in the pleading. This is true even though the court doubts that the plaintiff will be able to overcome the defects in the initial pleading. *Jackson v. Nelson*, 405 F.2d 872, 874 (9th Cir. 1968). Amendment should be refused only if it appears *to a certainty* that the plaintiff cannot state a claim. *Udom*, 846 F.2d at 1238 (emphasis added). The better practice is to allow at least one amendment regardless of how unpromising the initial pleading appears because except in unusual circumstances it is unlikely that the court will be able to determine

conclusively on the face of a defective pleading whether the plaintiff actually can state a claim. *Schlesinger Inv. Partnership v. Fluor Corp.*, 671 F.2d 739, 741 (2d Cir. 1982). "As a practical matter, a dismissal under Fed. R. Civ. P. 12(b)(6) is likely to be granted only in the unusual case in which the *plaintiff* includes allegations that show on the face of the complaint that there *is* some insuperable bar to relief." *Bennett v. Berg*, 685 F.2d 1053, 1058 (8th Cir. 1982) (emphasis added), *quoting, Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982), *quoting, Jackson Sawmill Co. v. United States*, 580 F.2d 302, 306 (8th Cir. 1979). The Eighth Circuit "has consistently disapproved of the practice of terminating litigation for informality or insufficiency of statements." *Sparks v. England*, 113 F.2d 579, 581-582 (8th Cir. 1940). The federal courts have followed a fairly restrictive standard in ruling on motions for judgment on the pleadings. Although the motion may be helpful in disposing of cases in which there is no substantive dispute that warrants proceeding further, thereby easing crowded trial dockets, hasty or imprudent use of this summary procedure by the courts violates the policy in favor of ensuring to each litigant a full and fair hearing on the merits of his claim or defense. *Roemhild v. Jones*, 239 F.2d 492, 494 (8th Cir 1957). Pleading should be construed to do substantial justice. Fed. R. Civ. P. 8(f). Specificity sufficient to supply fair notice of the nature of the action will withstand a motion under Rule 12(b)(6). *Bennett*, 685 F.2d at 1058, *citing, Bramlet*, 485 F.2d at 716. On a motion to dismiss a complaint under Rule 12(b)(6), plaintiff's material allegations are accepted as true and are construed liberally in favor of the plaintiff. *Parkview Heights Corp. v. City of Black Jack*, 467 F.2d 1208, 1212 (8th Cir. 1972) And when discovery is relevant to a court's consideration of a pending motion for summary judgment (as it was in the instant case), the motion should not be granted without discovery. *Cf. Walker v. U. S. Environmental Protection Agency*, 802 F.Supp. 1568 (D.C. Tex. 1992) (holding that, when discovery is not relevant to a court's

consideration of a pending motion for summary judgment, the motion may be granted without discovery).

The bankruptcy court clearly abused its discretion by denying leave to amend despite an overwhelming abundance of case law which should have caused the bankruptcy court to grant at least one opportunity to amend the Complaint as to the five dismissed defendants. The failures of the district court and the Eighth Circuit to review that issue were abuses of discretion which accordingly merit this Court's immediate review.

III. Certiorari Is Warranted Because The Eighth Circuit Did Not Conduct A *De Novo* Review Of The Justification For And Reasonableness Of The Sanctions Imposed By The Bankruptcy Court.

Ostensibly, the bankruptcy court sanctioned petitioners' attorney under Fed. R. Bankr. P. 9011(2) for failing to state claims which were warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. It was for the same reason that the same bankruptcy judge sanctioned the undersigned attorney $929 almost 12 years ago in *In re Quartz* (Bky 4-90-7521 June 18, 1991) (Dreher, J.), *rev'd, Alfred Stanbury v Quartz, Inc., John Stoebner, Trustee, and Wesley Huisinga, U. S. Trustee* (D. Minn. Civ. No. 3-91-477 June 24, 1992) (Murphy, J.). In vacating the sanction on appeal, the district court judge held in pertinent part:

> It is agreed that neither party had any knowledge of the unpublished opinion in In re United Shipping Co. until it was distributed [by the bankruptcy judge] at the hearing. On this appeal, the trustee depends entirely on [that case] and does not cite any other authority to show that the position of Schneider was unwarranted by existing law.
>
> At the time of the hearing, there was no

> case law cited by the parties which dealt with the precise issue before the court. Stanbury, however, cited Tunberg v. First National Bank of Moorhead, 232 N.W.2d 813 (Minn. 1975), as support for Schneider's position that a composition with creditors is not a binding contract until approved by the bankruptcy court. Although this case did not deal with an objection under Bankruptcy Rule 9019, one commentator agrees with Stanbury's interpretation of this case. See 7 Dunnell Minn. Digest 3d Composition With Creditors § 1.00b (3d ed. 1986). Stanbury thus presented at least tenable support for his argument.
>
> *
> *
> *
>
> 'A legal position is unwarranted by law, within the meaning of Rule [90]11, only where, after reasonable inquiry, an attorney would recognize that it is patently clear that position has absolutely no chance of success.' In re HBA East, Inc., 101 B.R. 411, 412 (E.D.N.Y. 989). *The position for which Stanbury argued was an issue of first impression in that there apparently was no published case law directly on point. A reasonable inquiry under these circumstances would not have demonstrated that there was no chance of success.* On the contrary, Tunberg arguably supports the argument made by Stanbury. (Emphasis added.)

In fifteen years of practice involving numerous trials and the drafting of numerous pleadings and motion arguments, Rule 11 or 9011 sanctions have been imposed against petitioners' attorney twice--in *Quartz* and in the instant case, and in each instance the sanctions were imposed precipitously and with

undisguised *animus* and elitism[10] by the same intemperate judge. The undersigned attorney had not had the pleasure of appearing before that judge on any other occasion and had appeared in bankruptcy court in only one other case during his fifteen years of practice, Petitioners' Complaint speaks for itself. *See generally* Pet. App. 15a-22a.

The naming of the dismissed parties as defendants in the instant case presented the bankruptcy court with issues of first impression. In the absence of case law on point, a reasonable inquiry could not be expected to have demonstrated that there was no chance of success, and thus it was an abuse of discretion to impose sanctions on petitioners' attorney for failing to state claims which were warranted by existing law without extending at least one opportunity to amend the Complaint.

Rule 9011 is not intended to stifle creativity or growth in the law. *See* Advisory Committee Note to Fed. R. Civ. P. 11 ("The rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."). The reasonable inquiry requirement does not preclude a lawyer from using discovery to establish facts supporting a position. A legal position is unwarranted by law where any reasonably competent attorney would recognize that it is patently clear that it has absolutely no chance of success. *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985). However, if there is even modest difficulty in resolving the merits of a challenged legal

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10 *E.g.*, the bankruptcy judge managed to squeeze the following into a half-hour hearing: "I have never seen a complaint that is so woefully inadequate"; "this claim is so farfetched and unbelievable"; "I think the plaintiff[s'] counsel is woefully confused"; "I really believe that the plaintiff[s'] counsel in this case has little or no understanding of what bankruptcy law is all about"; "[I]t is pretty clear to me that the plaintiff[s'] lawyer is not zeroed in and does not know all that much about bankruptcy law"; "I think that the plaintiff[s'] counsel is woefully confused about what is and is not in the province of this court."

position, then the Rule 9011 certification has been satisfied. *Id* The sanctions imposed by the bankruptcy court were unreasonable and should not have been imposed in the first place for the reasons set out *supra.*

Most significantly, the bankruptcy court did not evaluate the reasonableness of the hourly rate claimed by the Fredrikson & Byron respondents' attorney Karpenko in terms of the customary compensation charged by comparably skilled practitioners (*i.e.,* attorneys who have been in private practice for no more than a year) and thus did not provide the district court with a basis for review. The hourly rate of $165 claimed by attorney Karpenko was not supported by any evidence that he actually commands that rate from private clients, and it is unlikely that he did since he appeared at the time to have been in private practice for only about a year, if that. Moreover, because his clients in the adversary proceeding were his employer and an associate of his employer, it is impossible to believe that those clients were billed $165 per hour, that Fredrikson & Byron paid him a salary at the rate of $165 per hour, or, that he would have otherwise been working on another matter for which he would have commanded $165 per hour. This Court in *Hensley v. Eckerhart.* 461 U.S. 424, 433 (1983) emphasized that "billing judgment" is to be exercised and that "hours that are not properly billed to one's client also are not properly billed to one's adversary." It thus was an abuse of discretion for the Eighth Circuit to summarily uphold *the district court's* summary affirmance of the justification for and the reasonableness of the sanctions imposed by the bankruptcy court. This case accordingly merits this Court's immediate review.

IV. Certiorari Is Warranted Because The Eighth Circuit's Imposition Of Rule 38 Appellate Sanctions Was An Abuse Of Discretion.

Rule 38 sanctions are imposed if a court of appeals determines that an appeal is frivolous. The Eighth Circuit did not expressly find petitioners' appeal to be frivolous. The Eighth Circuit simply said "Appellees'

motion for attorneys' fees in the sum of $3,954.70 is granted." Pet. App. 3a. The Fredrikson & Byron respondents were the only "appellee" who had brought a motion for appellate sanctions, and it was brought pursuant to Fed. R. App. P. 38. Where the bankruptcy court precipitously dismissed five of the six named defendants without first providing an opportunity to amend, where the district court issued its unschooled order before petitioners' time to file a reply brief had run, and where sanctions were imposed on petitioners' attorney unjustifiably, petitioners' appeal was not in the least bit frivolous. Under the circumstances, the Eighth Circuit's imposition of Rule 38 sanctions was a clear abuse of discretion, and this case accordingly merits this Court's immediate review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALFRED STANBURY
Counsel of Record
STANBURY LAW FIRM P.A.
2209 St. Anthony Parkway
Minneapolis, MN 55418
(612) 789-5060
Attorney for Petitioners

APPENDIX A: ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED ON FEBRUARY 26, 2003

***

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 02-1683

In re: Thomas M. Sendecky	*	
	*	
Debtor,	*	Appeal from the
	*	United States
Floret, LLC, Michele Lea Eggert,	*	District Court
	*	for the District of
Appellants,	*	Minnesota
	*	
v.	*	
	*	
Thomas J. Sendecky; et al,	*	
	*	
Appellees.	*	

After consideration of the court, appellant's motion for stay of mandate pending the filing of a writ of certiorari is denied.

February 26, 2003

Order entered at the Direction of the Court:
s/Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B: ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED ON FEBRUARY 14, 2003

***

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 02-1683

Floret, LLC and Michele Lea Eggert,	*	
	*	Order Denying
	*	Petition for
Appellants,	*	Rehearing and
	*	Rehearing En
v.	*	Banc
	*	
Thomas J. Sendecky; et al,	*	
	*	
Appellees.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 14, 2003

Order entered at the Direction of the Court:
s/Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C: ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED ON FEBRUARY 6, 2003

***

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 02-1683

In re: Thomas M. Sendecky	*	
	*	
Debtor,	*	Appeal from the
	*	United States
Floret, LLC, Michele Lea Eggert,	*	District Court
	*	for the District of
Appellants,	*	Minnesota
	*	
	*	
v.	*	
	*	
Thomas J. Sendecky; et al,	*	
	*	
Appellees.	*	

After consideration of the district court's order for sanctions is affirmed.

Appellees' motion for attorneys' fees in the sum of $3,954.70 is granted.

February 6, 2003

Order entered at the Direction of the Court:
s/Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D: ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED ON JANUARY 6, 2003

***

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 02-1683

In re: Thomas M. Sendecky	*	
	*	
Debtor,	*	Appeal from the
	*	United States
Floret, LLC; Michele Lea Eggert,	*	District Court
	*	for the District of
Plaintiffs-Appellants,	*	Minnesota
	*	
v.	*	
	*	
Thomas M. Sendecky,	*	
	*	
Defendant,	*	
	*	
Thomas J. Sendecky; Gregory M. Hewitt; Hewitt Financial Services; Fredrikson & Byron, P.A.; Rick Petry,	*	
	*	
Defendants-Appellees.	*	

Submitted: December 9, 2002
Filed: January 6, 2003

Before WOLLMAN, HEANEY, and MELLOY, Circuit Judges.

HEANEY, Circuit Judge.

Floret, LLC and Michele Lea Eggert appeal from a district court order affirming the bankruptcy court's dismissal of five of the six defendants from an adversary proceeding and the bankruptcy court's sanctioning of Floret's attorney. We affirm.

On June 5, 2001, a state court judgment for breach of contract was entered against Thomas M. Sendecky in the sum of $16,253.19. To collect on the judgment, Floret served Thomas M. Sendecky with garnishment papers on June 18, 2001. Seven days later, Thomas M. Sendecky filed for Chapter 7 bankruptcy.

Thereafter, Floret filed an adversary action against Thomas M. Sendecky and Thomas J. Sendecky, Gregory Hewitt, Hewitt Financial Services, Fredrikson & Byron PA, and Rick Petry seeking to prevent entry of the discharge pursuant to 11 U.S.C. 727(c). The thrust of the complaint was that Thomas M. Sendecky lied on his petition for bankruptcy in an effort to avoid paying the debt he owed Floret and the other defendants had conspired with him in his efforts. The bankruptcy court dismissed the claims against all defendants save one with prejudice. It dismissed Floret's complaint against Thomas M. Sendecky without prejudice and granted leave to file an amended complaint within ten days. It also awarded Hewitt and Fredrikson & Byron their costs and attorney's fees in the sum of $3,535 pursuant to Federal Rules of Bankruptcy Procedure 9011.

Floret filed an appeal with the United States District Court for the District of Minnesota. The district court had difficulty discerning the basis of Floret's complaint. It stated:

> From what the Court can discern, Floret seems to allege that the Appellees had some obligation to come forward and tell the Bankruptcy Court that Thomas M. Sendecky

> did not owe them any money .... Floret also seems to suggest that Appellees somehow conspired with Thomas M. Sendecky to fabricate these false debts so that Thomas M. Sendecky's petition for bankruptcy would be accepted and the debts owed to Floret would be discharged.

In re Sendecky, No. 01-42790, 2002 WL 341037, 1 (D. Minn. 2002). Floret also alleged that the bankruptcy court should have applied the theory of equitable subordination to its case, despite Floret's failure to mention equitable subordination in any of its prior briefs. The district court affirmed the bankruptcy court in all respects before Floret had an opportunity to file a reply brief.

Floret appeals to this court. He questions the decision of the district court to deny relief before Floret had an opportunity to file its reply brief and then argues that the appellees had a duty to tell the court what was or was not owed to them by Thomas M. Sendecky and that its claim against the other creditors should be considered a claim for equitable subordination. The district court held that none of the theories support the appellants' claim. We agree. It is clear from the complaint and the answers that no valid cause of action was stated against the appellees. These creditors may be appropriate witnesses in Floret's adversary proceeding, but they are not appropriate defendants. Moreover, as the district court pointed out, Floret's claim for equitable subordination must fail because there are no assets in the estate to distribute. In re Danbury Square Assocs., 153 B.R. 657, 661 (Bankr. S.D.N.Y. 1993). We find no error in the district court's decision to issue its opinion before Floret filed its reply brief. Floret has failed to demonstrate that it had any additional arguments that had not already been advanced in its opening brief, nor does Floret cite any

case law that suggests that the district court's actions constitute reversible error. See City of Los Angeles v. Santa Monica Baykeeper, 254 F.3d 882, 888 (9th Cir. 2002).

The district court also held that the bankruptcy court did not abuse its discretion in awarding fees and costs to Hewitt and Fredrikson & Byron. We find no abuse of discretion in this award.

The order of the district court is affirmed in all respects.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX E: ORDER OF UNITED STATES DISTRICT COURT FOR DISTRICT OF MINNESOTA, FILED ON FEBRUARY 28, 2002.

***

UNITED STATES D1STRICT COURT
DISTRICT OF MINNESOTA

In re:

Bky. No. 01-42790 (hICD)
Chapter 7 Bankruptcy

Thomas M. Sendecky,

Debtor.

Adv. No. 01-4253 (N'CD)

Floret, LLC and Michele Lea Eggcrt,

Plaintiffs,

v.

Thomas M. Sendecky,
Thomas J. Sendecky,
Gregory M. Hewitt,
Hewitt Financial Services,
Fredrickson & Byron, P.A.,
and Rick Petry,

Defendants.

Floret, LLC and Michele Lea Eggert,

Civ. No. 02-902 (DF)

Appellants,

:.

MEMORANDUM OPINION AND ORDER

Thomas 1 Sendecky,
Gregory M. Hewitt,
Hewin Financial Services,
Frednckson & Byron, P.A.,
and Rick Petry,

Appellees.

Alired M. Stanbury, Esq., Stanbury Law Office, 2009 St. Anthony Parkway, Minneapolis, M~' SS4l 8, counsel for Plaintiff-Appellants.

Thomas M. Sendecky, 5912 Diamond Lake Lane, Minneapolis, MN 55419, Defendant *pro se.*

Thomas J. Sendecky, 591' Viamond Lakc Lane, Minneapolis. MN 55419, Defendant-Appellee *pro se.*

Thomas J. Flynn, Esq., Larkin Hoffinan Daly & Lindgren, 1500 Wells Fargo Plaza, 7900 Xerxes Avenue South, Bloomington, MN 55431, counsel for Defendant-Appellees Gregory M. Hewitt and Hesvitt Financial Services.

David R. Marshall, Esq., and Gregory E. Karpenko, Esq., Fredrikson &: Byron, 1100 International Center, 900 Second Avenue South, Mirmeapolis, MN 55402-3187, counsel for Defendant-Appellees Fredrickson & Byron, P.A. and Rick Petry.

Introduction

The above-entitled matter is before the Court on Floret, LLC and Michele Lea Eggert's appeal from two November 29, 2001 Orders of United States Bankruptcy Judge Nancy C. Dreher in the adversary proceeding captioned Floret, LLC and Michele Lea Eggert v. Thomas M. .Scndecky, et al., Adv. No. 01-4253. Floret, LLC and Michele Lea Eggert (collectively, "Floret")

appeals from the Orders that: (a) dismissed all claims against the Appellees; (b) denied Floret leave to amend its complaint as against Appellees; and (c) imposed sanctions pursuant to Bankruptcy Rule 9011.

In addition, Appellees Gregory M. Hewitt and Hewitt Financial Serviccs have brought a motion for sanctions.

Background

This case arises out of thc Chapter 7 bankruptcy petition of Thomas M. Sendecky.[1] Thc Appellants (collectively, "Floret") are creditors of Thomas M. Sendecky, having obtained a judgment against him in prior litigation.

Thc Appellees ar all entities listed as creditors on Thomas M. Sendecky's petition for bankruptcy. Thomas J. Sendecky is Thomas M. Sendecky's father. Gregory Hewitt and Hewitt Financial Services (collectively "Hewitt") were co-defendants of Thomas M. Sendecky in the prior litigation. Rick Petry is an attorney with Fredrickson & Byron, P.A.; he represented both Thomas M.. Sendecky and Hewitt in the prior litigation. In his petition for bankruptcy, Thomas M. Sendecky apparently asserted that he owed his father a substantial sum of money, that he owed Fredncksoa & Byron money for legal fees, and that he owed Hewitt for a portion of the legal fees paid by Hewitt to Fredrickson & Byron.

Thomas M. Sendecky filed for Chapter 7 bankruptcy on June 25, 2001. His debts were duly discharged.

Floret filed the underlying adversary action against Thomas M. Sendecky and the Appellees, apparently seeking revocation of the discharge pursuant to I I U.S.C. § 727(c). Floret asserts that

---

1 The Bankruptcy Court dismissed the claims against Thomas M. Sendecky, but granted Floret leave to amend the complaint against Thomas M. Sendecky. Accordingly, Floret's claims against Thomas M. Sendecky are not a subject of this appeal.

Thomas M. Sendecky did not owe any money to Thomas J. Sendecky, Fredrickson & Byron, or Hewitt. Floret asserts that Thomas M. Sendecky lied on his petition for bankruptcy in an effort to avoid paying the genuine debt he owed to Floret.

The complaint in the adversary proceeding did not seek any form of relief from or state any legal basis of a claim against any of the Appellees. Even now, after the Bankruptcy Court proceedings and the briefs associated with this appeal, the basis for Floret's claims against the Appellees remains unclear. From what the Court can discern, Floret seems to allege that the Appellees' had some obligation to come forward and tell the Bankruptcy Court that Thomas M. Sendecky did not owe them any money, that the petition was inaccurate. Floret also seems to suggest that Appellees somehow conspired with Thomas M. Sendecky to fabricate these false debts so that Thomas M. Sendecky's petition for bankruptcy would be accepted and the debts owed to Floret would be discharged.

In a November 29, 2001 hearing, Judge Nancy C. Dreher dismissed the claims against the Appellees and denied Floret an opportunity to amend his complaint. Judge Dreher also awarded Hewitt and Fredrickson & Byron their fees and costs pursuant to Bankruptcy Rule 9011. Floret has appealed those decisions.

Discussion

1. Standard of Review

On appeal of a final order, the District Court conducts a *de novo* review of the legal determinations of the Bankruptcy Court. *See Pagosa Lakes Property Owners Ass'n v. Fairfield Pagosa, Inc. (In re Fairfield Pagosa, Inc.)*, 97 F.3d 247, 252 (8th Cir. 1996). The Bankruptcy Court s decision to impose attorneys' fees and costs is reviewed under the abuse-of-discretion. standard. *See In re Kujawa.* 2?0 F.3d 578, 581-82 (847-Cir. 2001).

2. Bankruptcy Court's Order of Dismissal

The Bankruptcy Court properly dismissed the claims against the Appellees, to the extent that there

were any claims pled. Floret is seeking to revoke the discharge of its debt pursuant to I I U.S.C.. § 727(c). The debtor's other creditors are not proper defendants in such an action. Floret seems to feel that the other creditors should be defendants because it was their fraud and their complicity in Mr. Sendecky's fraud which forms the basis for the 727(c) claim. Floret is wrong. The other creditors may be appropriate witnesses in Floret's adversary proceeding, but they are not appropriate defendants.

On appeal, Floret claims that his claim against the other creditors should be considered a claim for equitable subordination[2]; that, because of the other creditors' fraud or their complicity in Mr. Sendecky's fraud, their claims should be subordinate to Floret's. Again, Floret is woefully misled.

Floret's equitable subordination argument fails for a number of reasons, but the most obvious is that equitable subordination is a moot issue in a no-asset proceeding such as this. The trustee has declared that there are no assets in the estate to distribute. "If there is going to be no bankruptcy distribution, equitable subordination is meaningless." *In re Danhury Square Assocs.*, 153 B.R. 657, 661 (Bankr. S.D.N.Y. 1993). That principle should be self-evident. Equitable subordination is a doctrine which is applied in determining which of a number of creditors is first in line to be reimbursed. Applying equitable subordination in the case of a no-asset estate would be tantamount to determining who is first in line for an empty buffet.

If Floret convinces a court to revoke the discharge of debts in Mr. Sendecky's bankruptcy, and *if* there

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2 The phrase "equitable subordination" is not anywhere in Floret's complaint and it was never uttered in the hearing before Judge Dreher. Floret's rather novel assertion is that Judge Dreher, having great familiarity with the law of bankruptcy, should have understood that Floret should have been couching his claims in terms of equitable subordination. The Court strongly believes that the law imposes no such obligation on any judge.

were any assets to distribute amongst Mr. Sendecky's creditors, and *if* any of the other creditors were to subsequently make a claim on Mr. Sendecky's estate, the doctrine of equitable subordination might become relevant. But it is certainly not relevant now and is not an adequate basis upon which to drag these four Appellees into litigation.

3. Bankruptcy Court's Award of Fees and Costs

The Bankruptcy Court did not abuse its discretion in awarding fees and costs to Hewitt and Fredrickson & Byron. Florct contends that the Bankruptcy Court should not have imposed sanctions because that court should have been able to divine Floret's equitable subordination claim from the bald accusations of the complaint. Yet, even if the Bankruptcy Court had looked at the complaint and somehow ascertained that Floret was attempting to claim equitable subordination, the court would have been justified in imposing sanctions because an equitable subordination claim is so clearly inapplicable to this case.

The Court further concludes that the Bankruptcy Court did not abuse its discretion in determining that $165 per hour was a reasonable fee for Mr. Karpenko

4. Hewitt's Motion for Sanctions

Appellees Gregory M. Hewitt and Hewitt Financial Services have brought a motion for sanctions pursuant to Bankruptcy Rule 9011 and Rule 11 of the Federal Rules of Civil Procedure. These Appellees have requested their attorneys' fees and costs associated with this appeal.

Although it appears to the Court that such sanctions would be entirely appropriate, the Court finds that it has not yet afforded Floret a reasonable opportunity to respond. Therefore, the Court will deem the Motion for Sanctions to be pending.

For the reasons stated, **IT IS HEREBY ORDERED:**

1. The Order of Dismissal and of Sanctions of the United States Bankruptcy Court for the District of Minnesota is **AFFIRMED**.

Dated: 2/28/02

s/ Donovan W. Frank

DONOVAN W. FRANK
Judge of United States
District Court

APPENDIX F: PETITIONERS' ADVERSARY PROCEEDING COMPLAINT AND JURY DEMAND, FILED ON SEPTEMBER 27, 2001.

***

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Thomas M. Sendecky,

Debtor.

Case No. BKY 01-42790 (ND)

Voluntary Chapter 7 Case

Floret, LLC, and Michele Lea Eggert,	)	
Plaintiffs,	)	
v.	)	JudgeNancy Dreher
	)	Adv. Proc. No.
Thomas M. Sendecky, Thomas J. Sendecky, Gregory M, Hewitt, Hewitt Financial Services, Fredrikson & Byron, P.A., and Rick Petry,	)	
Defendants.	)	

COMPLAINT AND JURY DEMAND

As and for their Complaint, plaintiffs Floret, LLC, and Michele Lea Eggert state and allege as follows:

1. This court has jurisdiction over this proceeding, which arises in a case under the Bankruptcy Code and

concerns money or property of the debtor and plaintiffs' relationship to other creditors, pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J).

2. Plaintiff Floret, LLC, is a judgment creditor of the debtor, Thomas M. Sendecky, said judgment for $16,253.19 having been entered on June 1, 2001, in favor of Floret, LLC, and Michele Eggert, jointly and severally, following the trial of the case of *Floret, LLC, and Michele Eggert v. Hewitt Financial Network, a sole proprietorship, and Gregory M. Hewitt, jointly and severally, and Thomas M. Sendecky*, Hennepin County District Court No. AC 99-015802(Oliesky, J.) [hereinafter "The Hewitt-Sendecky Case"]. Floret's principal place of business is located at 1115 Vicksburg Plaza - Suite 1, Plymouth, MN 55447.

3. Plaintiff Michele Lea Eggert, the sole member of plaintiff Floret LLC, was a very close friend of the debtor from 1986 to 1999 and resides at 1730 Fountain Lane North, Plymouth, MN 55447

4. Defendant and debtor Thomas M. Sendecky, age 35, has always or virtually always resided with his parents, whose current address is 5912 Diamond Lake Lane, Minneapolis, MN 55419,

5. Defendant Thomas J. Sendecky is the debtor's father and currently resides at 5912 Diamond Lake Lane, Minneapolis, MN 55419.

6. Defendant Gregory M. Hewitt was a defendant in The Hewitt-Sendecky Case but settled prior to trial. His address is 8600 Kell Avenue, Bloomington, MN 55437

7. Defendant Hewitt Financial Network was a defendant in The Hewitt-Sendecky Case but settled prior to trial. It is a sole proprietorship of defendant Gregory M. Hewitt, and its office is located at 6100 Green Valley Drive - Suite 200, Bloomington, MN 55438.

8. Defendant Fredrikson & Byron is a law firm with an office at 1100 International Centre, 900 Second Avenue South, Minneapolis, MN 55402-3397.

9. Defendant Rick Petry is an attorney employed by defendant Fredrikson & Byron and represented the debtor and defendants Gregory M. Hewitt and Hewitt Financial Network in The Hewitt-Sendecky Case.

10. On June 18, 2001, plaintiffs served wage garnishment papers on the debtor at his place of employment (the Minnesota Commerce Department). Seven days later on June 25, 2001, the debtor filed for Chapter 7 bankruptcy for no other reason but to thwart plaintiffs' attempt to execute on the judgment entered in their favor in The Hewitt-Sendecky Case. The debtor signed the Petition on June 22, 2001, four days after his wages were garnished by plaintiffs.

11. The debtor seeks a discharge of unsecured debts totalling $304,037.87 and testified at the creditors' meeting that his defunct Sendecky Concrete, Inc., has separately outstanding debts of "about" $200,000.

12. The debtor's originally filed Schedule F did not include the date on which each claim was incurred, the consideration for such claim, nor the account number for each claim.[1] His revised Schedule F, which was served *after* the creditors' meeting on July 26, 2001, contains no account numbers and does not appear to have been filed with the court nor served on any of the creditors other than the plaintiffs and trustee herein.

13. Of the total unsecured debts of $304,037.87 claimed by the debtor on his revised Schedule F, the debtor attests to owing $43,300 to eight credit card companies. By way of entries on his revised Schedule F, the debtor admits that such debts were incurred more than six years ago and thus would be unenforceable against the estate.

14. In his revised Schedule F, the debtor attests to owing $26,660.68 to six credit card collection companies, some if not all of which is duplicative of the amount the debtor claims to owe credit card companies. By way of entries on his revised Schedule F, the debtor admits that such debts were incurred

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1 In other words, nothing was entered in the middle column of the originally filed Schedule F.

more than six years ago and thus would be unenforceable against the estate.

15. The debtor attests in his revised Schedule F to owing legal fees of $10,000 to non-lawyer defendants Gregory Hewitt and Hewitt Financial Services but testified under oath in September 2000 in The Hewitt-Sendecky Case that he did not owe any money to Gregory Hewitt (and Gregory Hewitt testified under oath in September 2000 in The Hewitt-Sendecky Case that he was owed no money by the debtor). The debtor at the same time attests in his revised Schedule F to owing $10,000 to Fredrikson & Byron, even though the debtor testified at the creditors' meeting that he owes $10,000 to defendant Gregory Hewitt because Hewitt paid the legal fees which the debtor owed to Fredrikson & Byron in The Hewitt-Sendecky Case. The debtor also testified at the creditors' meeting that Fredrikson & Byron had never billed him for legal services rendered in The Hewitt-Sendecky Case. Defendants Fredrikson & Byron and Rick Petry either suborned perjury during the depositions of the debtor and Gregory Hewitt in September 2000 in The Hewitt-Sendecky Case or have remained inexcusably silent in the face of their knowledge of the debtor's filing of false claims herein concerning monies owed by the debtor to Gregory Hewitt and Fredrikson & Byron.

16. By way of an interrogatory in The Hewitt-Sendecky Case, the debtor was asked to provide for each time he had owed money to Gregory Hewitt (a) the amount owed and the reason it was owed, (b) the date such obligation arose, and (c) whether paid and, if paid, the date(s) on which it was paid. The debtor answered under oath as follows: "Defendant Sendecky does not believe he has owed money to Defendant Hewitt and/or Hewitt Financial." For the date the claim of Hewitt Financial Network and Gregory Hewitt arose, the debtor states "legal fees - cash 5/94 to current." (Emphasis added).

17. In his revised Schedule F, the debtor attests to owing $2,706 to three creditors pursuant to a so-called

line of credit. By way of entries on his revised Schedule F, the debtor admits that such debts were incurred more than six years ago and thus would be unenforceable against the estate.

18. In his revised Schedule F, the debtor attests to owing $2,596 to two phone companies. By way of entries on his revised Schedule F, the debtor admits that such debts were incurred more than six years ago and thus would be unenforceable against the estate.

19. In his revised Schedule F, the debtor attests to owing legal fees of $1,000 to the undersigned lawyer and his law firm, but that debt was written off in 1999 and thus is not in need of discharge.

20. In his revised Schedule F, the debtor attests to owing $2,000 to Wells Fargo Educational for a school loan for the 2000 school year but testified in September 2000 in The Hewitt-Sendecky Case that defendant Gregory Hewitt "gave" him a check for $4,000 in late 1999 to pay for his schooling.

21. The debtor attests in his revised Schedule F to owing the same amount ($6,026) to a credit card company (CitiBank/Gulfstream Credit) and a collection agency (Pinnacle Credit Services), but, by way of entries on his revised Schedule F, the debtor admits that such debts were incurred more than six years ago and thus would be unenforceable against the estate.

22. In his revised Schedule F, the debtor attests to owing the same amount ($2,344 and $2,345) to two different creditors (Beneficial National Bank and Best Buy), but, by way of entries on his revised Schedule F, the debtor admits that such debts were incurred more than six years ago and thus would be unenforceable against the estate.

23. In his revised Schedule F, the debtor attests to having accrued a debt of $170,000 to his father over the past seventeen years, *i.e.*, since 1985. (Emphasis added).

24. In his revised Schedule F, the debtor attests to owing $17,396 to three cement supply companies. By way of entries on his revised Schedule F, the debtor

admits that such debts were incurred more than six years ago and in any event are debts owed by the defunct Sendecky Concrete, Inc., and thus would be unenforceable against the estate.

25. Consequently, of the $304,037.87 which the debtor attests he owes to unsecured creditors and without allowing for duplicative claims, $285,268.68 consists of debts which are barred by the six-year statute of limitations and/or The Statute of Frauds, gifts, and falsifications which cannot be enforced against the debtor's estate. The remainder, $18,779.19, consists of the judgment of $16,253.19 entered in plaintiffs' favor in The Hewitt-Sendecky Case on June 1, 2001, and the judgment of $2,526 obtained by the law firm of Brutlag, Hartman & Okoneski in July 1997.

26. The debtor's Schedule J overstates his monthly expenditures by at least $1,200. He has not paid and does not pay rent to his parents and cannot prove otherwise, he has not paid and does not pay them for food and cannot prove otherwise, he has not spent and does not spend $150 per month for clothing and cannot prove otherwise; and he cannot prove that he has paid and pays $65 per month for internet service where it is common knowledge that the market for such service is $15-20. His takehome pay is actually about $1,166 per month (or $14,388 annually) and has been so since about February 2000. Nevertheless, despite netting some $23,000 over the past 20 months and the running up of "debts" totalling more than $300,000, the debtor has the temerity to disclose that he has only $269 in a credit union account and household goods worth only $2,500.

27. The debtor testified to the trustee at the creditors meeting that he does not own a vintage Corvette, that nobody to whom he is related owns or has ever owned a vintage Corvette, and that a vintage Corvette is not now nor has ever been parked in his father's garage. Such testimony is belied by the fact that plaintiff Michele Eggert, who was a frequent visitor to the debtor at his father's home from 1986 to 1999, saw that

the car (covered by a form-fitted tarp) was always parked in the middle of three garage stalls, and she even rode in it with the debtor.

JURY DEMAND

28. Plaintiffs demand a trial to a jury on all issues triable to a jury.

CAUSES OF ACTION

Count I

Violation of 11 U.S.C. § 727(a)(2)

29. Plaintiffs repeat, reiterate, and reallege each and every allegation contained in paragraphs 1 through 28 with the same force and effect as if more fully set forth herein at length.

30. With an intent to hinder, delay, or defraud a creditor or an official of his estate, the debtor has removed, destroyed, mutilated, or concealed property of the debtor or property of the estate within one year prior to or after the commencement of this case.

Count II

Violation of 11 U.S.C. § 727(a)(3)

31. Plaintiffs repeat, reiterate, and reallege each and every allegation contained in paragraphs 1 through 30 with the same force and effect as if more fully set forth herein at length.

32. The debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, thus denying creditors an ability to make an informed investigation of the debtor's pre-filing conduct and to fairly test the accuracy and completeness of the debtor's disclosures in relation to his assets and financial affairs.

Count III

Violation of 11 U.S.C. § 727(a)(4)

33. Plaintiffs repeat, reiterate, and reallege each and every allegation contained in paragraphs 1 through 32 with the same force and effect as if more fully set forth herein at length.

34. The debtor has knowingly and fraudulently, in or

in connection with the case, made a false oath or account or presented or used a false claim.

Count IV

Violation of 11 U.S.C. § 727(a)(4)

35. Plaintiffs repeat, reiterate, and reallege each and every allegation contained in paragraphs 1 through 34 with the same force and effect as if more fully set forth herein at length

36. The debtor has failed to explain satisfactorily, before determination of denial of discharge, any loss of assets or deficiency of assets to meet the debtor's liabilities.

WHEREFORE, plaintiff Floret, LLC, and Michele Eggert pray that this court deny the discharge of the debtor and order such other relief as is just and proper.

STANBURY LAW FIRM P.A.

Dated: 9/23/01

s/ Alfred Stanbury

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